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No. 86-870

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY AND
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI, AND
SAGA PETROLEUM U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

LOUIS F. CLAIBORNE*
EDGAR B. WASHBURN
SEAN MCCARTHY
JO LYNN LAMBERT
WASHBURN & KEMP
A Professional Corporation
144 Second Street
P.O. Box 880130
San Francisco, CA 94188
Telephone: (415) 543-8131
Attorneys for Amicus Curiae
American Land
Title Association

* *Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether lands underlying wholly non-navigable tidal waterbodies inured to the new states under the Equal Footing doctrine.

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BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The American Land Title Association is the national trade association of title insurance companies and their agents whose 2000 members are in the business of searching, examining and insuring land titles in connection with the purchase, sale and financing of real property throughout the United States. It is no exaggeration to say that few real estate transactions take place unless one of these companies is prepared to insure the validity of the title to the property involved in the transaction. Obviously, the members of the Association must rely on the stability of land titles, which traditionally has been treated as an important principle counselling the courts against changes in real property law.

In coastal states, non-navigable but tidally-influenced backwaters, sloughs and streams have for more than a century been treated by the federal government and the states as falling outside

of the ambit of the Equal Footing doctrine. Accordingly, the underlying water bottoms have been freely transferred by federal and state grants into private ownership, and on this basis, members of the American Land Title Association have issued thousands of title insurance policies totalling billions of dollars. It is most unsettling now to be told by the Supreme Court of Mississippi that the long-since discredited ebb and flow test of navigability divests petitioners of their lands. Our fear, of course, is that this assault on private titles will extend to private grants in every coastal state, most of which have been insured by the Association's members.

Fueling these concerns, the State of California has sought to recapture as Equal Footing lands much of the long since alienated two million acres of swamp and overflowed lands granted to the state under the Arkansas Swamp Act of 1850, 9 Stat. 519, 43 U.S.C. § 981, et seq., and confirmed to it under the 1886 Act to Quiet Title to Lands in California. 14 Stat. 219, 43 U.S.C. § 987.[1] Initially, California claimed only tidally-influenced non-navigable tributaries in swamplands (or former swamplands) bordering San Francisco Bay, Humboldt Bay, Newport Bay, San Diego Bay and similar areas along the California coast.[2] Recently, however, following the reasoning adopted by the Mississippi Supreme Court, the State has extended its claim to reach non-navigable

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[1] Other public land states received grants of over 62 million acres of swamp and overflowed lands under the Swamp Land Acts of 1849, 1850 and 1860. S. Shaw & C. Fredine, *Wetlands of the United States*, U.S. Fish & Wildlife Service, Circular 39 at 5 (1971). Mississippi, the state in suit, has over three million acres of natural or reclaimed swampland, nearly all in private ownership, a substantial part of which is now subject to potential state claims. *Id.* Nor are property owners in the thirteen original states immune; they, too, have experienced challenges to title in tidally-affected non-navigable creeks and marshes. *E.g., Hirsch v. Maryland Dept. of Natural Resources*, 288 Md. 95, 416 A.2d 10 (1980); *Velsicol Chemical Corp. v. State Dept. of Envtl. Protection*, 182 N.J. Super. 575, 442 A.2d 1051 (1982); Mass. Ann. Laws ch. 91, § 1 (Law. Co-op. 1985).

[2] S. Shaw & C. Fredine, *Wetlands of the United States*, U.S. Fish & Wildlife Service, Circular 39 at 5 (1971).

backwater tributaries of the Sacramento and San Joaquin Rivers located 100 miles from San Francisco Bay, contending that they are tidally-influenced and therefore Equal Footing lands. *California ex rel. Public Works Board v. Southern Pacific Transportation Co.*, No. 277312 (Sacramento Superior Court, 1985).

If the Mississippi court's decision stands, millions of landowners will be abruptly divested of their property without any hope of compensation and states will be further encouraged to accelerate what has become a popular program of rewriting history, 100 to 150 years after the fact, to recapture lands formerly sold by them. *E.g., Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339 (Fla. 1986), *cert. denied sub nom., Mobil Oil Corp. v. Board of Trustees*, No. 86-823 (February 26, 1987). One consequence would be a deluge of claims for failure of private title. To say the least, amicus has a giant financial stake in this issue, which spans all of the coastal states. Given this broader perspective, we believe the American Land Title Association contributes a different point of view that may be helpful to the Court in its consideration of the present case.

INTRODUCTION AND SUMMARY OF ARGUMENT

All parties and both courts below agree that the areas still in dispute—totalling a mere 42 acres—consist of lands underlying tidal, but wholly non-navigable waterbodies, being very shallow streams or drainage ditches in the marshy "backwaters" several miles from a bay opening to the sea (Bay St. Louis) and some distance from a navigable river that empties into the bay (the Jourdan River). It is apparently common ground as well that the waters overlying the lands in issue were equally non-navigable in 1817, when Mississippi was admitted to the Union.

Fortunately, the agreement about the facts carries over to the source of the governing law. Whatever alternative grounds might be available to sustain the State's claim to the water bottoms in suit, the only basis asserted here—and the only one sustained below—is the Equal Footing doctrine, as it allegedly operated to convey these tidelands to the State when it was admitted to the Union in 1817. And it is expressly conceded that federal law

determines this question, defining the scope of the constitutional grant. *See* Pet. App. 1a, 7a-8a, 10a; Miss. Br. in Opp. 18-25, 39. On the other side, petitioners pursue no argument in this Court that their title, because it precedes statehood, is exempt from the rule of the Equal Footing doctrine. Accordingly, the outcome of the case here turns, by common consent, on the "inland" reach of the Equal Footing doctrine, as defined by federal law.

At this point, the parties diverge widely. Petitioners' stance, which we support, is that by virtue of the constitutional Equal Footing principle, each state is entitled only to the beds of waterways, salt or fresh, that were navigable in fact at the date of admission to the Union. This, of course, excludes wholly non-navigable tidal waterbodies. On the other hand, the State's unqualified position, vindicated by the courts below (see Pet. App. 2a, 10a, 15a, 35a, 62a-63a, 65a-66a, 67a), is that *any* tidal area is, in law, navigable, whatever the fact (Miss. Br. in Opp. 17, 20 and n.2). In the Attorney General's own words (*id.* at 16), the State's ownership of the soil is asserted with respect to every tidal waterbody, "regardless of whether the water courses are commercially navigable, regardless of how shallow the water, and regardless of how far inland or remote from the sea." Or, to use the extraordinary metaphor of the Mississippi Supreme Court, the State's title is said to follow the tide, for any distance, through every twist and turn, no matter how narrow or shallow or circuitous the route, provided only "one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat [at mean high tide]." Pet. App. 12a. In response, we submit the following points.

1. We first establish that when Mississippi became a state in 1817 there was no settled common law rule accepted as federal law that the sovereign owned all lands underlying non-navigable waters affected by the ebb and flow of the tide. Indeed, for title purposes, federal law appears already to have repudiated the English ebb and flow test. At all events, even in England, that test did not encompass tidal waterbodies that were not in fact navigable. And that requirement of actual navigability was followed in America.

2. The proposition just stated disposes of the case. However, even assuming (contrary to our prime submission) that a literal equation of navigability with tidality was federal doctrine in 1817, the supposed expansive ebb and flow test was entirely replaced when the Court adopted the "navigability-in-fact" standard in the mid-Nineteenth Century.

3. On the hypothesis just outlined, there remains to be answered the claim that the State's submerged lands rights vested under the law as understood in 1817 and cannot be affected by a later redefinition of the Equal Footing doctrine. We reply that Mississippi neither relied on, nor had basis for relying on, the ebb and flow standard in 1817. And certainly the principle of equality between the states requires that Mississippi not be favored as compared to more recent states, admitted after the navigability-in-fact standard was in place.

ARGUMENT

To understand the issue presented, it is essential to distinguish between two quite different geographical settings—which the court below seems to have confused. The first involves the shallow tidelands immediately bordering a navigable body of water, whether it be the open sea, a bay or inlet, or the navigable stretch of a tidal river. That situation *is* comparable to a navigable freshwater lake or river with gradually sloping banks, as the Mississippi Supreme Court suggested. Pet. App. 10a-12a. In both cases, the "bed" of the waterbody that belongs to the State (unless it chooses to disclaim it) includes the foreshore or bank up to the line of mean high water, even though those "edges" are not themselves navigable.

The second physical setting involves a *discrete*, wholly non-navigable body of water, which is properly viewed as separate, albeit it is connected by a water channel to the sea or to a navigable bay, inlet, river or lake. Here, the argument by analogy to nontidal waters cuts against the conclusion reached below. Indeed, in the case of freshwater, it is well-settled that the State's title to the soil ends at the head of navigation even with respect to a single river. *E.g., Brewer-Elliott Oil & Gas Co. v. United States,*

260 U.S. 77 (1922). And the State has no claim to the bed of a wholly non-navigable tributary or distributary of a nontidal navigable stream or lake. *See United States v. Utah*, 283 U.S. 64 (1931). Although the land underlying non-navigable areas at the side of the navigation channel *is* encompassed in the state's title, the soil beneath further stretches of the river, and branches of it, is *not* when these, viewed separately, are not navigable. Plainly, one cannot measure the Equal Footing grant to the states of nontidal waterbottoms by applying the "sail upon a toothpick" test. *See* Pet. App. 12a.[3] Nor is such a test apposite in the case of tidal waters, for, as the Mississippi court rightly said, "the legal boundaries of navigable tidewaters are conceptually and functionally the same as those for navigable freshwaters." Pet. App. 11a. *See also id.* at 10a.[4]

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[3] At this point in its opinion, the court below seems to have misunderstood the "navigable-in-fact" test as applied to freshwater. *See* Pet. App. 10a-12a. Clearly, this Court's decision in *Montana v. United States*, 450 U.S. 544, 551 (1981), cited below (Pet. App. 10a), does not remotely support the "toothpick" test. Perhaps, the Mississippi court has little occasion to deal with the question because of the unusual rule of property there which concedes ownership of the bed of navigable freshwaters to the riparian proprietors. *See* Pet. App. 16a-17a. Later, however, the court appears to reverse direction, now agreeing that the beds of non-navigable freshwater streams are not embraced by the Equal Footing principle. Pet. App. 15a-16a. And, far from invoking the freshwater rule as a persuasive analogy (as it had done a few pages earlier), the court here concedes "a logical incongruity" in the asserted distinction between the rules governing tidal and nontidal waters which, the court insists, "may not be well reasoned," but is "well settled." Pet. App. 16a. Even so, it is not entirely clear whether the court is now speaking only of isolated non-navigable streams, or also including such streams when connected to a navigable watercourse.

[4] We might add that the difficulties of distinguishing between the non-navigable "edges" of a navigable waterway and a wholly non-navigable "separate" waterbody are much the same in each case and afford no argument for ignoring the difference when tidal waters are involved. Moreover, the method for drawing the dividing line between two distinct bodies of tidewater is well established. See *Knight v. United Land Association*, 142 U.S. 161, 207-208 (Field, J., concurring) (1891).

So much for the reasoning of the Mississippi Supreme Court: if we follow the standard applicable to freshwater, the result must be to exclude from sovereign ownership the soil underlying any non-navigable tidal waterbody that realistically can be seen as a distinct feature, enjoying a separate identity notwithstanding a physical connection with the sea or with a navigable bay or inlet or river. But, of course, the result reached below may be right even though the logic is flawed. *Cf.* Pet. App. 16a. And we accordingly look at the question afresh.

I

THE RELEVANT LAW IN 1817 DID NOT RECOGNIZE SOVEREIGN TITLE TO LANDS UNDERLYING NON-NAVIGABLE TIDAL WATERS IN THE STATES

The shortest solution to the case may lie in asking directly: What was the law governing the ownership of tidelands in 1817? The Mississippi Supreme Court confidently asserts two propositions on this score: (1) that the English common law rule of navigability was then controlling in this country for the purpose of determining state title to permanently or periodically submerged lands; and (2) that, under this "ebb and flow" test, the tidal character of the overlying waters was not only the necessary, but also the sufficient, condition of navigability. *See* Pet. App. 8a-10a. If either assumption is erroneous—as we believe both are—Mississippi's claim fails.

A. The Federal Law of 1817 as to the Ownership of Submerged Lands Did Not Follow the Common Law Ebb and Flow Test

As we indicate in a moment (*infra*, pp. 20-22), it is very doubtful that anyone in 1817 understood that public rights in navigable waters required public ownership of the bottoms or that any sovereign property in submerged soils appertained to the states, rather than the Nation, even where (as in Mississippi) the United States retained all the unsold uplands. Thus, it is something of a fiction to speak of the "understanding of 1817" in the present context. But this is not the only obstacle in the way of the State's claim.

The Mississippi Supreme Court to the contrary notwithstanding, it is not good history that the English tidality test (whatever its scope) prevailed throughout America in 1817. Before that date, some states had already adopted the "navigability-in-fact" standard to determine ownership of water bottoms, whether in tidal or fresh waters. *E.g., Carson v. Blazer*, 2 Binn. 475 (Pa. 1810); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 68 (1851) (referring to the "Great Pond Ordinance" of 1641). *See generally, Shively v. Bowlby*, 152 U.S. 1, 31-32 (1894). It would not be surprising, therefore, if, except as to admiralty jurisdiction, the *federal* rule—which, of course, determines the scope of the Equal Footing grant at statehood[5]—had even then broken away from the ebb and flow test.

As it happens, there is strong evidence that this is so. The Northwest Ordinance of 1787, section 14, article IV, declared that "the navigable waters leading into the Mississippi and St. Lawrence"—although certainly not tidal—"shall be common highways and forever free." *See* Act of August 7, 1789, ch. 8, 1 Stat. 50, 52n (re-enactment). So, also, in two statutes of 1786, opening land for sale within the Territory, it is expressly provided that "all navigable [streams and] rivers" within the area now opened up "shall be deemed to be and remain public highways." Act of May 18, 1796, ch. 29, § 9, 1 Stat. 464, 468; Act of June 1, 1796, ch. 46, § 6, 1 Stat. 490, 491.[6] And like provisions, obviously reaching non-tidal waters, are to be found in a number of contemporary Acts of Congress organizing territories or admitting

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[5] Whatever doubts were once entertained on this score, the point has long since been settled. *E.g., United States v. Holt State Bank*, 270 U.S. 49, 55, 56 (1926); *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376 (1977).

[6] Significantly, in each case, the cited section goes on to stipulate that "in all cases, where the opposite banks of any stream *not navigable* shall belong to different persons, the stream and the bed thereof shall be common to both" (emphasis added). The clear implication is that the beds of navigable rivers are reserved to the United States.

new states.[7] Indeed, one example is the Enabling Act of March 1, 1817, for the admission of Mississippi, which expressly embraced non-tidal rivers, including the Mississippi River itself, as "navigable rivers and waters" that must remain "common highways" and "forever free." Act of March 1, 1817, ch. 23, § 4, 3 Stat. 348, 349.[8] *See also Bowman v. Wathen*, 3 F. Cas. 1076 (D. Ind. 1841) *aff'd on other grounds*, 42 U.S. (1 How.) 189 (1843) ("the fact of navigableness does, in no respect, depend upon the ebb and flow of the tide").

Thus, when this Court a few years later expressly rejected the ebb and flow test of navigability for all purposes in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-456 (1851), *The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557, 563 (1871), and *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1877), it was not radically changing American law, but rather, conforming to the rule long since adopted by the Congress. *See The Propeller Genesee Chief*, 53 U.S. (12 How.) at 457-458. It

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[7] *E.g.*, Act of March 3, 1811, ch. 46, § 12, 2 Stat. 662, 666 (Louisiana Territory); Act of June 4, 1812, ch. 95, § 15, 2 Stat. 743, 747 (Missouri Territory); Act of February 20, 1811, ch. 21, § 3, 2 Stat. 641, 642 (Louisiana); Act of April 8, 1812, ch. 50, § 1, 2 Stat. 701, 703 (Louisiana).

[8] According to *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229-230 (1845), such enabling act provisions are authorized by the Commerce Clause—which, of course, does not confine Congress to legislation touching only navigable waters, or even water. *See Kaiser Aetna v. United States*, 444 U.S. 164, 173-174 (1979). For this reason, the modern regulations of the Army Corps of Engineers tell us nothing about the scope of navigability for purposes of state title. *See United States v. Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 11. But the much broader federal commerce power, as applied to waterways, was not clear in the early Nineteenth Century. Thus, it seems the *Pollard's Lessee* Court was assuming the reach of the federal navigational servitude, here exercised, was coextensive with the State's title to submerged lands and was pointing out that the two principles could peacefully coexist. At all events, however, we have in this provision an exactly contemporaneous Congressional declaration that, in American law, the term "navigable waters" was not understood to mean only waters affected by the tide.

should be stressed, moreover, that the only decisions of this Court endorsing the "ebb and flow" test were restricting federal admiralty jurisdiction. *E.g.*, *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825); *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847). As was pointed out in *The Propeller Genesee Chief*, 53 U.S. (12 How.) at 458, these cases did not touch property rights. On that score, the United States (where it held the public lands) had from the beginning excluded the beds of non-tidal navigable waters from its grants. *See Barney v. City of Keokuk*, 94 U.S. 324, 338 (1877); *Shively v. Bowlby*, 152 U.S. at 32-33. And it seems this Court, as early as 1845, was conceding to the new states—under the Equal Footing doctrine—the beds and shores of all "navigable waters," including non-tidal rivers over which the United States could exercise its navigational servitude. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) at 229-230.[9] At the least, Mississippi cannot claim reliance on any "well-settled" federal ebb and flow test governing title to submerged lands as of 1817.

B. The Common Law Ebb and Flow Test Did Not Treat As Navigable Wholly Non-Navigable Waterbodies

Even if (contrary to our submission) the "ebb and flow" standard *was* accepted as the relevant federal rule of decision in 1817, it remains to determine whether that test reserved to the

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[9] In light of like provisions in recent Enabling Acts—which expressly or necessarily encompassed non-tidal rivers as "navigable waters"—it is clear the Enabling Act for Alabama equally embraces non-tidal rivers when it stipulates that "all navigable waters within the said State shall for ever remain public highways . . . ." Act of March 2, 1819, ch. 47, § 6, 3 Stat. 489. Yet, it is apparently with reference to the same waterbodies that the Court declares the State's title to the "shores of navigable waters, and the soils under them." *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) at 229, 230.

It may be noted, also, that in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842), the Court speaks of the original states holding "the absolute right to all their navigable waters, and the soils under them . . . ," without any express limitation to tidal waters.

sovereign all tidelands, even wholly discrete non-navigable "backwater" areas. The answer, quite clearly, is "no."

1. We look primarily to England for guidance, because that is the source of our ebb and flow test, so far as it ever prevailed here. In 1817, as today, the English common law was that—absent a grant—the Crown owns the territorial sea bed and the soil underlying arms of the sea, including navigable tidal rivers, up to the line of ordinary high tide. H. Schultes, *Essay on Aquatic Rights*, 110, 121, 132-134 (1811); *8 Halsbury's Laws of England*, 857 (4th Ed. 1974). To be sure, in the cases and the treatises, the qualifier "navigable" is sometimes omitted.[10] But that merely reflects the geographical reality that, in the British Isles, tidal areas almost invariably are navigable, at least at ordinary high tide. *See, e.g., Mayor of Colchester v. Brooke*, 7 Q.B. 339, 115 Eng. Rep. 518 (1845). It does *not* endorse the fiction that tidality is, in law, equivalent to navigability.

On the contrary, the requirement of actual navigability is explicitly set forth in one of the most comprehensive and

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[10] It is not always so, however. As early as the mid-Fourteenth Century, the Crown's original ownership of submerged lands is associated with tidal rivers that qualify as "highways" (22 *Lib. Ass.*, pls. *6, 93* (1346-1348), and in many old cases and commentaries with "navigable" waterways. *E.g., LeRoy v. Trinity House*, 1 Sid. 86, 82 Eng. Rep. 986; 1 Keb. 300, 301, 83 Eng. Rep. 958 (K.B. 1662); *Ball v. Herbert*, 3 T.R. 253-254 (1789); *Rex v. Smith*, 2 Dougl. 441, 99 Eng. Rep. 283 (K.B. 1790)); *Lord Advocate for Scotland v. Hamilton*, 1 MacQueen 46, 48 (H.L. 1852) (Scot.); M. Hale, *Prerogatives of the King* 310-311 (Selden ed. 1976); Blackstone, *Commentaries*, bk. I, ch.7; Bacon, *Abridgment*, vol. IV, *Prerogative* 3 (4th ed. 1778). In two of the modern leading cases, the rule is restricted to "all *navigable* rivers where the tide flows and reflows" or "*navigable* tidal rivers." *Gann v. Free Fishers of Whitstable*, 11 H.L.C. 192, 207, 11 Eng. Rep. 1305, 1312 (1865); *Malcomson v. O'Dea*, 10 H.L.C. 593, 618, 11 Eng. Rep. 1155, 1165 (1863) (emphasis added). And in another House of Lords decision, the *locus in quo* is described, presumably because it mattered, as "a *navigable* tidal river, or arm of the sea." *Goodman v. Saltash*, [1882] A.C. 633, 637 (emphasis added).

respected authorities, Coulson and Forbes, *On Waters and Land Drainage*:

> A public navigable river is a river which is *actually navigable and* in which the tide ebbs and flows; . . .
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> * * *
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> Though the flux and reflux of the tide is *prima facie* evidence that a river is navigable, it does not necessarily follow, that because a tide flows and reflows in any particular place, it is therefore a public navigation . . . . If it is a petty stream navigable only at certain states of the tide, and then only for a short time, and by very small boats, it is difficult to suppose that it has ever been a public navigable channel. *Not every ditch or cutting which is reached by the tide forms part of the public navigable river*, even though it be large enough to admit the passage of a boat.

Coulson and Forbes, *On Waters and Land Drainage*, 100-101 (6th Ed. 1952) (emphasis added). *See also id.* at 506-508.

The same proposition—albeit stated with some reluctance—is reported as the settled law by S. and H. Moore in their *History of Law and Fisheries* (1903). They write (at 166-167): "The mere fact of the presence of the tidal influence does not of itself make a place navigable," and conclude that "[i]t must therefore be a question of evidence in every case whether a particular part of any tidal water is or is not navigable."[11] See also, *Earl of Ilchester v.*

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[11] It might be supposed that the definition of public "navigable waters" varied in English law depending upon whether the issue was the public's right to fish or the Crown's ownership of the bed. Not so. Although there was at one time a question whether public fishing rights extended to *non-tidal* navigable rivers (firmly answered in the negative by 1868), it was *never* suggested that those rights attached to *non-navigable tidal* areas where the Crown did not originally own the soil. On the contrary, although because of Crown grants, ancient or modern, public fishing rights might exist in waters whose soil was now privately owned (and vice versa, albeit rarely), it has always been understood that the common law viewed both the Crown right in the soil and the public

Raishleigh, 61 L.T. (N.S. 1889) 477, 479; *Sim E. Bak v. Ang Yong Huat* [1924] A.C. 429, 433-434; 49 *Halsbury's Laws of England* 214 n.3 (4th ed. 1984).

Nor is this a new doctrine, unknown in 1817. In fact, much of the language just quoted from Coulson and Forbes comes from a well-known case decided in 1825, in which the court explicitly rejected the proposition that an area affected by "the flux and reflux of the tide" was therefore navigable. *Rex v. Montague*, 4 B.&C. 598, 602, 107 Eng. Rep. 1183, 1184, per Bayley, J. (K.B. 1825). And there were earlier decisions as well. *E.g.*, *Mayor of Lynn v. Turner*, 1 Cowp. 86, 98 Eng. Rep. 980, 981, Lofft 556, 98 Eng. Rep. 796 (K.B. 1772); *Miles v. Rose*, 5 Taunt. 705, 128 Eng. Rep. 868, 1 Marsh. 313 (C.P. 1814); *See also* H. Woolrych, *A Treatise on the Law of Waters and of Sewers*, 31-32 (1830).[12]

2. Like their English counterparts, American publicists and jurists who analyzed the ebb and flow test expressly followed the English precedents which rejected the automatic equation of navigability with tidality and required, in addition, a showing of navigability-in-fact. Thus, Joseph Angell, perhaps the leading American authority on water rights in the Nineteenth Century, as early as 1826 was referring to the English common law position that the ebb and flow test was "to be restrained by a reference to public necessity and general utility," and that "the public right is to be confined to what is of public use." J. Angell, *A Treatise on*

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right to fish as coextensive in tidal areas. *See, e.g.*, M. Hale, *De Jure Maris*, ch. IV and V, reprinted in R. Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm*, Appendix vii, ix, xvii (2d Ed. 1875); *Malcomson v. O'Dea*, 10 H.L.C. 593, 618, 11 Eng. Rep. 1155, 1165 (1863); *Murphy v. Ryan*, 2 Ir. Rep. C.L. 143, 151 (1868); *Attorney-General for British Columbia v. Attorney-General for Canada*, [1914] A.C. 153, 167-171 (Can.).

[12] This conclusion as to the scope of the English "ebb and flow" test is shared by modern scholars. *E.g.*, G. MacGrady, "The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water," 3 Fla. St. U.L. Rev. 511, 573-575, 586 (1975); J. Stevens, "The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right," 14 U.C.D. L. Rev. 195, 201 (1980).

the Rights of Property in Tide Waters and In the Soil and Shores Thereof, 127, 150 (1st Ed. 1826). *See generally*, *id.* at 125-163 and the authorities cited therein. By 1847, Angell was approvingly quoting from Mr. Justice Bayley's judgment in *Rex v. Montague*, *supra*, p. 13, and reciting an equally explicit passage from an opinion by Chief Justice Lemuel Shaw of Massachusetts:

> It is not every ditch, in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek, in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture.

Rowe v. Granite Bridge Corp., 38 Mass. (21 Pick.) 344, 347 (1838), quoted in J. Angell, *A Treatise on the Rights of Property in Tide Waters and in the Soil and Shores Thereof*, 89-90 (2d Ed. 1847). *See also Glover v. Powell*, 10 N.J. Eq. 211, 222-223 (Chan. 1854) J. Gould, *A Treatise on the Law of Waters Including Riparian Rights and Public and Private Rights in Waters Tidal and Inland*, 104-106, 209, and decisions cited at 104 n.5 and 209 nn.5 & 6 (2d Ed. 1891).

There is, moreover, some evidence that even where the English common law *was* misunderstood as extending Crown ownership of the soil into non-navigable tidal areas, that part of the rule was not followed. Thus, in an early Massachusetts case, Chief Justice Parker wrote:

> By the common law, the property of the sovereign is said to extend to all places where the sea ebbs and flows, whether such places are navigable or not; but it is probable the usages of our country have given a reasonable limitation to this doctrine, confining the public right to what may be of public use; so that in many little creeks into which the salt water flows, but which are incapable of being navigated at all, private property may be maintained .... There is but one principle for judicial courts to be governed by, and that is, to consider as public property all those inlets of the sea which

> are capable of sustaining vessels of any description, with their loading, for purposes really useful to trade or agriculture.

Commonwealth v. Charlestown, 18 Mass. (1 Pick.) 184, 186-188 (1822). *Accord Elder v. Burrus*, 25 Tenn. (6 Humph.) 342, 350 (1845).

All the more was such a common sense qualification of the tidality test appropriate to the geography of the Gulf Coast. One can perhaps conceive a simplistic ebb and flow rule applied on the Atlantic Ocean when the United States comprised only the original thirteen States. But, after the Louisiana Purchase of 1803, and the admission of Louisiana to the Union in 1812, it is wholly unreal to suppose that federal law treated as "navigable" every area affected by the tide. One need only consider the innumerable tidal marshes and swamps and other inaccessible, but tidally influenced, areas comprising the delta of the Mississippi River. *See Louisiana v. Mississippi*, 202 U.S. 11, 45-46 (1906); *United States v. Louisiana*, 394 U.S. 11, 63, 65-66 (1969). Indeed, the obvious non-navigability of the tidal "backwaters" of the delta, together with the obvious navigability of the mainstream of the Mississippi miles beyond any tidal affect, presumably counseled total rejection of any "ebb and flow" test for the Gulf States. *See* pp. 7-10, *supra*; 16-19, *infra*. But, at all events, no one—least of all a Mississippian—could have supposed in 1817 that tidality automatically established navigability and that non-navigable tidal backwaters were "navigable" for title purposes. Significantly, Mississippi has apparently waited 170 years to apply any such undiscriminating "tidal influence" rule to remote non-navigable tidal backwaters. *See* Pet. App. 17a-18a. It is much too late in the day to be re-inventing the federal law of navigability to accommodate the present claim.

II

THE UNDERSTANDING OF 1817 IS IRRELEVANT IN LIGHT OF THE REPUDIATION A FEW YEARS LATER (IF NOT EARLIER) OF ANY EBB AND FLOW TEST EMBRACING NON-NAVIGABLE WATERS

We have submitted that in 1817 there was no federal rule of law—"settled" or otherwise—that labelled the non-navigable tidal areas in dispute as "navigable waters" and declared the underlying soil to belong to the State as "sovereign lands" under the constitutional equal footing doctrine. Indeed, we have shown that even the English common law would not have treated these waters as "navigable" or their beds as Crown property. If that is right, Mississippi's claim fails, without more. But the State fares no better even if we assume for purposes of argument that the ebb and flow test *was* being applied in 1817, and was being applied contrary to English common law to include non-navigable waters. The reason is that any such tidality standard, if ever effective for our purposes, was wholly replaced in mid-Nineteenth Century judicial decisions by the rule requiring actual navigability, and that no sovereign rights "vested" in the interim.

A. The Ebb and Flow Test Was Wholly Repudiated in The Nineteenth Century

It is undisputed that the ebb and flow test—whatever its scope—ceased to be the sole standard of navigability for any federal law purpose after 1876, if not much earlier. As we have noted, the Court sustained the extension of admiralty jurisdiction to actually navigable freshwaters in 1851 (*The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851)), and a like ruling with respect to the reach of the federal commerce power over navigation came in 1870 (*The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557 (1871)). Finally, of immediate relevance here, the Court in 1876 confirmed that state "sovereign" lands under the Equal Footing doctrine included the bed and shores of navigable non-tidal waters. *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1877). And that has remained the law. *E.g., Utah v. United States*, 403 U.S. 9 (1971); *Montana v. United States*, 450 U.S. 544, 551-552 (1981). The only question is whether the navigability-in-fact rule is applicable to non-tidal watercourses

alone, as the court below held, or whether since 1876 it has *supplanted* the pre-existing ebb and flow test for all waters, tidal as well as fresh.

1. With all deference to the dissent in *Kaiser Aetna v. United States*, 444 U.S. 164, 181-182 (1979), we believe the Court has long since repudiated the ebb and flow test for all purposes. The opinion in *The Propeller Genesee Chief* dismissed the tidality standard as "purely artificial, arbitrary, as well as unjust" (53 U.S. (12 How.) at 454, 457) and characterized earlier rulings applying that test as "erroneous." *Id.* at 456. The Court stated plainly (*ibid*):

> The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.

Nowhere was any exception made for tidal waters. And this Court's decision in *The Daniel Ball* is no less clear:

> The doctrine of the common law as to the navigability of waters has no application in this country. *Here the ebb and flow of the tides do not constitute the usual test, as in England, or any test at all as to the navigability of waters.*

77 U.S. (10 Wall.) at 77, 563 (emphasis added). *See also McGilva v. Ross*, 215 U.S. 70, 78 (1909).

We are not surprised to find no express disapproval of the aspect of the old rule that allegedly treated as navigable wholly non-navigable tidal waterbodies substantially separated from the sea or its navigable arms, since, in our view, no such unqualified rule ever existed. But it is presumably not an accident that no decision of this Court condones a special standard for judging the navigability of tide-waters, or state rights in the underlying soil. In every case involving the state's title to the bed, whether beneath

non-tidal or tidal waters, the prevailing opinion refers indifferently to the same navigability-in-fact test.[13]

It is no contradiction that the Court has sometimes spoken of state title to "tidelands" without mentioning navigability at all. *See* Pet. App. 12a-13a. Those cases involved areas within, or at the edge of, obviously navigable waterbodies such as San Francisco Bay, San Diego Harbor, or Los Angeles Harbor. *E.g., Weber v. Board of Harbor Commissioners,* 85 U.S. (18 Wall.) 57 (1873); *Knight v. United States Land Association,* 142 U.S. 161 (1891); *United States v. Mission Rock Co.,* 189 U.S. 391 (1903); *United States v. Coronado Beach Co.,* 255 U.S. 472 (1921); *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10 (1935). They merely illustrate the accepted proposition that state ownership of the bed of navigable waters, tidal or non-tidal, reaches to the line of mean high water, even though there are non-navigable areas near shore.[14] Significantly, in the very few

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[13] *E.g., Packer v. Bird,* 137 U.S. 661, 666-667 (1891); *Hardin v. Jordan,* 140 U.S. 371, 381-382 (1891); *Illinois Cent. R.R. v. Illinois,* 146 U.S. 387, 435-437 (1892); *Mobile Transp. Co. v. Mobile,* 187 U.S. 479, 482 (1903); *Oklahoma v. Texas,* 258 U.S. 574, 586 (1922); *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U.S. 77, 86 (1922); *United States v. Holt State Bank,* 270 U.S. 49, 55-56 (1926); *United States v. Oregon,* 295 U.S. 1, 6 (1935); *Utah v. United States,* 403 U.S. 9, 10-11 (1971); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 374-375 (1977); *Montana v. United States,* 450 U.S. 544, 551-552 (1981).

[14] This is also the explanation of the definition of "lands beneath navigable waters" in the Submerged Lands Act insofar as it omits reference to the navigability of the overlying waters when including tidelands. 43 U.S.C. § 1301(a)(2). The legislative history of this provision indicates that the drafters were there focusing on tidal waters along the coast, seaward of all inland waters. *See* S. Rep. No. 133, 83rd Cong., 1st Sess. (1953) in 1953 U.S. Code Cong. & Ad. News 1492. *See also* the statement of Senator Cordon, one of the chief sponsors of the act:

> That definition has no other purpose than to identify the lands in question as being under nontidal waters in the upper areas *or being in tidal waters and—and I want this emphasized—outside inland waters.*

99 Cong. Rec. 2632 (emphasis added).

cases dealing with tidal areas substantially separated from the sea or its arms, the Court *has* commented on the questionable navigability of the smaller waterbody at statehood. *See Kaiser Aetna v. United States*, 444 U.S. at 178-179 & n.10; *Summa Corp. v. California ex rel. State Land Commission*, 466 U.S. 198, 206 n.4 (1984).[15] *See also San Francisco v. LeRoy*, 138 U.S. 656, 671-672 (1891).

The upshot is that there is (so far as we know) no reported decision by any federal court, much less this Court, condoning the extreme proposition put forward by the court below that the simplistic ebb and flow test governs sovereign ownership in tidal areas, even though the navigable-in-fact standard applies in all other cases. This alone is reason to doubt the correctness of the supposed rule. We need hardly add that the significantly disturbing impact on land titles in many states must caution against such a belated revision of the century old constitutional understanding.

2. If we accept the notion that an unqualified ebb and flow rule was once in vogue (even if never actually applied) but was abandoned in the Nineteenth Century, we must stress that repudiation of the old rule is necessarily retrospective so far as it affects state rights under the equal footing doctrine. This is so for two reasons. First, we are concerned with a *constitutional* principle which, absent relevant amendment of the Constitution, we must accept to have always been as it was ultimately declared. *See Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 381-382 (1977). Second, the state's title to the soil depends upon the navigable character of the overlying waters at the date of its admission to the Union. *Utah v. United States*, *supra*, 403 U.S. at 10. It logically follows that Mississippi's claim must be judged under the modern rule, whatever mistaken view was entertained in 1817—unless to do so would work an impermissible taking of vested rights, as appears to be suggested. *See* Pet. App. 6a-7a, 8a, 9a, 20a.

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[15] In neither case did the Court resolve the issue, because other factors mooted the point.

B. Measuring Mississippi's Equal Footing Grant By Applying the Modern Navigability-in-Fact Standard Works No Taking of Vested Rights

1. Upon its admission to the Union in 1817, Mississippi almost certainly did not understand that the State was automatically entitled to all tidelands within its boundaries, even assuming an unqualified tidality test of navigability then prevailed. This is, first, because in 1817 there was scant basis to predict this Court's later ruling in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842)—insofar as that decision broke away from English precedents to tie much more closely public rights in navigable waters and sovereign ownership of the submerged bed,[16] or, insofar as the Court conceded to the states, rather than the Nation, one of the former prerogatives of the English Crown associated with navigable waters.[17]

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[16] The issue in the case was whether Colonial proprietors who had relinquished governmental prerogatives to the Crown had retained title to certain submerged lands underlying a tidal estuary so as to be free to convey those waterbottoms to a private purchaser. Then, as now, the law of England recognized the Crown's ownership of the soil of navigable tidewaters as a *private* attribute, freely alienable to a subject, and accordingly, would presumably have favored the view that title to the disputed waterbottoms *remained* with the proprietors and was transferred in their later conveyance. *See Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) at 421-426, (Thompson, J., dissenting). Indeed, in England, the originally sovereign property in such submerged lands (as distinguished from the public rights in the overlying waters) had, for the most part, been alienated to riparian owners. *See, e.g., Le Strange v. Rowe*, 4 F.&F. 1048, 1052, 176 Eng. Rep. 903, 905 (N.P. 1866); S.A. Moore, *History of the Foreshore*, 19 (1888). Yet, this Court, although invoking English authorities, reached the opposite conclusion, reasoning—contrary to many of those precedents—that sovereign ownership of the soil was necessary to protect the public rights of navigation and fishing. *See id.* at 413-416. *Cf. United States v. California*, 332 U.S. 19, 43-45 (1947), Frankfurter, J., dissenting. At the very least, it cannot be said that this ruling was self-evident in 1842, much less in 1817.

[17] After all, a century later, this Court held that the states relinquished their interest in the marginal seabed to the national government when the Constitution was ratified. *United States v. California, supra*, 332

There is, moreover, a more difficult obstacle to the State's claim of reliance in that Mississippi, as a new "public land" state, could not directly benefit from the ruling in *Martin v. Lessee of Waddell*, but acquired its submerged lands only by virtue of the principle laid down in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845)—a decision which would have seemed even less inevitable to the most astute Mississippian of 1817. Putting aside the special factual and procedural problems in *Pollard's Lessee*,[18] the Court there ruled that the Equal Footing principle—although mandating equality in governmental prerogatives only, not landed wealth—required the automatic transfer of navigable waterbottoms from the United States to a new state upon its

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U.S. at 34-36; *United States v. Texas*, 339 U.S. 707, 717-718 (1950); *United States v. Maine*, 420 U.S. 515, 522-523 (1975). By a parity of reasoning, it might have been supposed that the soils underlying "arms of the sea," and the appurtenant tidelands, equally inured to the Nation when the "more perfect Union" was established.

Indeed, the regulation of navigation, an English Crown prerogative, had fallen to the national government, not to the states. By 1817, the Congress had already acted on the assumption that the Commerce Clause empowered it to regulate navigation—or to assure against its obstruction—on waters useful in interstate or foreign commerce, presumably including all navigable tidal rivers connected to the sea. *See* statutes cited at 8-9, *supra*. And, within a very few years, the Court would vindicate this notion of a federal "navigational servitude." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). *See also Wilson v. United States*, 30 F. Cas. 239, 245 (C.C.D. Va. 1820)(No. 17,846), per Marshall, C.J. Since the Court viewed ownership of the soil as being tied to such governmental functions, the natural consequence would have been to concede that also to the Nation.

[18] Among the unusual facts were that the land, although tideland at statehood, was now dry. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) at 220. If that resulted from alluvion, the decision presumably should have been against the State, given the situation of the parcel on the edge of Mobile Bay. *See California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 286 n.14 (1982). *See also Pollard's Lessee v. Hagan*, *supra* at 230 ff., Catron, J., dissenting.

admission to the Union. As the dissent commented (*id.* at 231),[19] this was especially puzzling in a constitutional regime that apparently permitted the United States to retain, and sell for its own benefit, the previously unappropriated *uplands* within a new state. *See, e.g., VanBrocklin v. Anderson*, 117 U.S. 151, 167-168 (1886). So far as we are aware, that mystery remains unexplained. *See United States v. California*, 332 U.S. 19, 30-31 (1947). At the least, it is difficult to maintain that the rule in *Pollard's Lessee*—which came as a surprise to Congress—was anticipated by Mississippi when it entered the Union under a formal compact that bound the future state to "forever disclaim all right and title to the waste and unapporpriated lands," which were to "remain at the sole and entire disposition of the United States." Act of March 1, 1817, ch. 23, § 4, 3 Stat. 348, 349.[20]

2. Moreover, even if we misapprehend the clairvoyance of the first Mississippians, it is perfectly clear the State never acted to its detriment on the assumption that it owned the tidelands in suit—whether by undertaking costly improvement works or even by granting leases, the proceeds of which might have to be reimbursed to the lessee. *Cf. United States v. Louisiana*, 394 U.S. 11, 73 n.97 (1969); *United States v. Maine*, 420 U.S. 515, 528 (1975). In these circumstances, it would seem wholly artificial to treat any mistake of law in 1817 as irrevocably vesting title to backwater tidelands. State property rights do not normally accrue simply because of an erroneous view of constitutional doctrine—even when, unlike here, the false premise was shared for

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[19] Justice Catron had made the point in *City of Mobile v. Eslava*, 41 U.S. (16 Pet.) 234, 249 (1842), without any expressed disagreement from his Brethren. For the background of *Pollard's Lessee*, see C.B. Swisher, *The Taney Period 1836-64*, 750-753 (1974) (being volume V of the *Oliver Wendell Holmes Devise History of the Supreme Court.*)

[20] Again, it may not have been immediately apparent to all why the United States should be charged with a solemn obligation to preserve unblemished title to navigable waterbottoms, segregated from the uplands because of their association with the ancient public rights of navigation and fishery, only to hand over these submerged lands to the new state for sale to the highest bidder, or even free disposition to the riparian proprietors.

many decades by all branches of federal and state governments. *E.g., United States v. California, supra,* 332 U.S. at 29-30, 36-38, 39-40. The "windfall" quality of such a result is not, however, the only, or the most serious, objection.

3. It must be remembered that the whole basis for Mississippi's claim is the Equal Footing principle. That State was entitled to be admitted to the Union on an equality with the original states and other states previously admitted. But, of course, the later states are likewise entitled to equal treatment. Yet, states joining the Union in the latter part of the Nineteenth Century or the Twentieth, are governed by the modern navigable waters rule. The problem is obvious, and so is its solution: to apply the true constitutional standard in *all* cases, even if that disappoints reasonable expectations among the original or early admitted states. *See United States v. Maine*, 420 U.S. at 521-527; *United States v. Texas*, 339 U.S. 707, 717-719 (1950). Fortunately, this result unsettles no private titles and requires no action from the State. Mississippi is simply held to an equality with all states, as the Constitution requires.[21]

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[21] It is worth noting that, according to the court below, Mississippi was entitled, if it chose, to take advantage of the "new" constitutional rule under which the states own the soils beneath navigable nontidal waters. Pet. App. 16a. We agree, but must comment that this seems very like having the best of both worlds if the State is also to retain the benefit of the supposed old rule encompassing the beds on non-navigable tidal waterbodies.

CONCLUSION

For the reasons stated, the judgment of the Mississippi Supreme Court should be reversed insofar as it affirms a decree vindicating the State of Mississippi's claim to lands underlying non-navigable tidal waterbodies on the ground that such waterbottoms inured to the State under the Equal Footing doctrine.

Respectfully submitted,

LOUIS F. CLAIBORNE*
EDGAR B. WASHBURN
SEAN MCCARTHY
JO LYNN LAMBERT
WASHBURN & KEMP
A Professional Corporation
144 Second Street
P.O. Box 880130
San Francisco, CA 94188
Telephone: (415) 543-8131
Attorneys for Amicus Curiae
American Land
Title Association

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* *Counsel of Record*